In the

United States

Circuit Court of Appeals

For the Ninth Circuit

In the Matter of the Application for a Writ of Habeas Corpus of BRUCE PIERCE, *Appellant,*

v.

TOM SMITH, *Superintendent of the Washington State Penitentiary at Walla Walla, Washington, Appellee.*

No. 12201

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE SAM M. DRIVER, JUDGE

BRIEF OF APPELLEE

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INDEX

TABLE OF CASES

STATUTES

TEXTS

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COUNTERSTATEMENT OF THE CASE

This matter is before the court on appeal from an order entered by the United States District Court for the Eastern District of Washington, Southern Division, the Honorable Sam M. Driver, Judge, dismissing appellant's application for a writ of habeas corpus. (Tr. 81.) The aforementioned order was entered following a hearing upon an order to show cause (Tr. 6), at which hearing appellant was allowed to go into the merits of his petition. (Tr. 16 to 52.)

Appellant was convicted by his plea of guilty before the superior court of the State of Washington for Yakima county, to the crime of Taking Indecent Liberties, a felony in the State of Washington. A judgment and sentence was entered by the aforementioned court on November 10, 1939, adjudging appellant guilty of the crime of Taking Indecent Liberties and ordering that he be punished by confinement in the state reformatory for a period of not more than twenty years (Tr. 75). Appellant was duly committed to the state reformatory at Monroe wherein he was confined until November 9, 1941, when he was granted a parole by the Board of Prison Terms and Paroles of the State of Washington. (Tr. 62.) This parole was subsequently revoked and appellant was reconfined in the reformatory (Tr. 66). On April 10, 1944, appellant was again granted a parole by the Board of Prison Terms and Paroles (Tr. 67), and was permitted to live in the State of Oregon under the supervision of the officials of that state. The last mentioned parole was, on November 23, 1945, revoked (Tr. 71), and appellant was transferred from the State of Oregon to the Washington State Reformatory where he was reconfined. Thereafter, the Board of Prison Terms and Paroles ordered that appellant be transferred from the reformatory to the state penitentiary at Walla Walla to serve the balance of his term. (Tr. 73.)

Following appellant's commitment to the Washington State Reformatory and immediately following the entry of the judgment and sentence of the Yakima county superior court the Board of Prison Terms and Paroles, pursuant to authority vested in them by law, fixed the "duration of confinement" of appellant at three years.

(Tr. 53.) Subsequent to the granting of the two paroles and revocations thereof and the transfer of appellant from the reformatory to the penitentiary, the Board of Prison Terms and Paroles again considered the matter of the duration of confinement of appellant and, having reached no conclusion, ordered that the case be continued "for the period of his full 20 year maximum sentence" (Tr. 74).

At the time of the revocation of appellant's second parole, when he was in the State of Oregon, his transfer to the State of Washington from that state was made under the authority of the Interstate Compact for the Supervision of Parolees and Probationers, which compact had been entered into by the states of Washington and Oregon on September 14, 1937, and was, at the time of transfer, then in effect (Tr. 79).

ARGUMENT

The power of courts of the United States to grant writs of habeas corpus is restricted by section 2241 of Title 28 of the United States Code, and, because appellant is in custody pursuant to a judgment and sentence of a state court, the power of the court to grant the writ in this particular case depends upon there being a showing that he is in custody in violation of the constitution or laws or treaties of the United States. 28 U. S. C. § 2241 (c) (3). Neither in his petition nor in his brief in this court does appellant attack the validity of the judgment and sentence as rendered by the Yakima county superior court. At the hearing appellant conceded the regularity of the judgment and sentence. (Tr. 18.) It *is* valid when tested by the requirements for the validity for a judgment and sentence as set forth in the case of *In re Clark,* 24 Wn. (2d) 105, 110, 163 P. (2d) 577.

Petitioner's contentions, summarized, are that

(1) He was improperly brought back from the State of Oregon into the State of Washington following the revocation of his second parole,

(2) That he is illegally confined in the penitentiary when the judgment and sentence ordered his confinement in the reformatory, and

(3) The Board of Prison Terms and Paroles "continued" the matter of re-setting the duration of his confinement following the revocation of the second parole.

The precise matters here raised have been litigated in an action between these identical parties in the courts of the State of Washington. The case of *Pierce v. Smith,* 131 Wash. Dec. 49, 195 P. (2d) 112 (cert. denied, U. S.

Supreme Court, October 11, 1948, 93 L. Ed. (Adv. Op.) 30, 69 S. Ct. 24) was an appeal from an order of the superior court for Yakima county denying on the merits an application for a writ of habeas corpus after a hearing pursuant to a show cause order. Because in its opinion in that case the Supreme Court of the State of Washington considered at length the same contentions which appellant has here raised, that opinion will be quoted from at length in this case and will be relied upon by respondent as his authority for the affirmance of the order of the district court.

First it must be stated that where the highest state court has reviewed on the merits an application for a writ of habeas corpus, considering federal questions and affording a full and fair adjudication, and the Supreme Court of the United States has denied certiorari, as is the situation in this matter (*Pierce v. Smith*, 131 Wash. Dec. 49, 195 P. (2d) 112; certiorari denied, October 11, 1948, 69 S. Ct. 24, 93 L. Ed. (Adv. Op.) 30; see also Tr. 19), a federal court will not ordinarily reexamine upon a writ of habeas corpus the questions thus adjudicated. *Ex parte Hawk*, 321 U. S. 114, 88 L. ed. 572, 64 S. Ct. 448; *House v. Mayo*, 324 U. S. 42, 89 L. ed. 739, 65 S. Ct. 517; *White v. Ragan*, 324 U. S. 760, 89 L. ed. 1348, 65 S. Ct. 978. Inasmuch as the courts of Washington permit inquiry by habeas corpus not only into the formal validity of the judgment but also into allegations of violations of rights guaranteed by the Constitutions of the United States and State of Washington (§ 3, chapter 256, Laws of Washington 1947; § 1075, Rem. Supp. 1947), which inquiry is equal to that permitted federal courts in habeas corpus review of state judgments, it is apparent that a full and

fair adjudication has been had and a reexamination by the district court was unnecessary.

Even *assuming* any or all of the above enumerated contentions of the petition to be true, would it follow that he is "in custody in violation of the Constitution or laws or treaties of the United States" upon which hinges the jurisdiction of the federal courts? We submit that it would not.

(1) While on his second parole appellant was permitted to reside in the State of Oregon and was placed subject to the supervision of the officials of that state. Following the determination by the Board of Prison Terms and Paroles of the State of Washington that appellant had violated the terms of his parole and the order of that board revoking his parole (Tr. 71), appellant was brought back to the State of Washington and reconfined in the reformatory.

Concerning the proceedings had in the transfer of appellant from Oregon to Washington, the Washington Supreme Court said in *Pierce v. Smith, supra*, at page 53 as follows:

> "Extradition proceedings were not necessary to effect the return of appellant to this state from the state of Oregon. The argument that appellant is being detained in this state for an offense for which he has never been tried is without merit.
>
> "Authority to permit a parolee to reside in another state and to bring him again to this state upon revocation of parole is found in the 'Interstate Compact for the Supervision of Parolees and Probationers,' to which Oregon and this state became parties in 1937. The Congress of the United States consented to this interstate compact by an act which became effective, June 6, 1934. See 48 Stat. 909. Enabling legislation for Oregon is contained in Oregon laws of 1937, chapter 36, and for this state, in laws of 1937,

chapter 92, p. 379, Rem. Rev. Stat. (Sup.) § 10249-11 [P.P.C. § 783-1].

"The compact provides that the authorities of one state may permit any person released on parole to reside in any other state which is a party to the compact, if such person is a resident of the receiving state, or if the receiving state consents to receive him. Under the provisions of the compact, duly accredited officers of the sending state may, at all times, enter the receiving state and there apprehend and retake any person on probation or parole, and no formalities will be required other than establishing the authority of the officer and the identity of the person to be retaken. All legal requirements to obtain extradition of fugitives from justice are waived on the part of states party to the compact as to such persons, and the decision of the sending state to retake a person on probation or parole, is conclusive upon and not reviewable within the receiving state.

"The challenge that the act is repugnant to Art. IV, § 2, clause 2, of the United States constitution, and to § 5278 of the revised statutes of the United States, 18 U. S. C. A. 662, providing for the extradition of fugitives from justice, and as being in violation of the fourteenth amendment to the United States constitution, in that it deprives one of liberty without due process of law, was considered in *In re Tenner*, 20 Cal. (2d) 670, 128 P. (2d) 338, and the compact was sustained. The court said:

> " 'Nor does the act of the respondent deprive the petitioner of his liberty without due process of law in violation of the Fourteenth Amendment to the United States Constitution. He had his day in court when he was tried and convicted of a felony and sentenced to a maximum term of five years in the Washington State Penitentiary. The parole which he accepted was granted upon the express condition that the Board of Prison Terms and Paroles "may at any time within its discretion and without notice cause the parolee to be returned to the said institution to serve the full maximum sentence or any part thereof." One convicted of crime has the right to reject an offer of parole, but

once having elected to accept parole, the parolee is bound by the express terms of his conditional release. (*In re Peterson*, 14 Cal. (2d) 82 [92 P. (2d) 890].) . . .

" 'The existence of an independent method of securing the return of out-of-state parolees does not conflict with nor render ineffectual the federal laws with relation to extradition. The federal method of extradition is always present and may be invoked when necessary to secure the right to return of the fugitive to the demanding state. Also states not party to the interstate compact are free to invoke that procedure to secure the return of fugitive parolees. And if a state has elected to follow the federal procedure and claim the constitutional guarantee, the fugitive of course has the right to insist, on habeas corpus, that the procedure conform to the federal law. Similarly the parolee detained under the interstate compact has the right to complain, by means of habeas corpus, if that law is not complied with by the authorities. But no right exists on the part of the parolee, whose parole has been revoked, to claim that he may only be removed by the method of his choosing. And since the statute applies uniformly to all parolees from states party to the compact, the petitioner may not complain that the statute deprives him of the equal protection of the laws.'

"Appellant's removal from Oregon was based upon a revocation of his parole, and his detention in the state penitentiary is based upon a judgment and sentence entered upon his plea of guilty to the crime of taking indecent liberties committed in Washington in 1939.

"The order revoking the parole of appellant is authorized by laws of 1935, chapter 114, § 4, p. 313, as amended by Laws of 1939, chapter 142, § 1, p. 422 (Rem. Rev. Stat. (Sup.), § 10249-4), which provides that the board of prison terms and paroles shall have the power to establish rules and regulations under which a convicted person may be allowed to leave the confines of

> the penitentiary or reformatory on parole, and shall also have the power to return such person to the confines of the institution from which such person was paroled, at the discretion of the board.
>
> "A parole is not a right, but a privilege to be granted or withheld, as sound official discretion may impel. *State ex rel. Linden v. Bunge,* 192 Wash. 245, 73 P. (2d) 516. The revocation of parole is a matter which is left entirely to the discretion of the board. The procedure followed to revoke the parole of appellant and return him to this state was pursuant to statutory authorization."

It is respondent's contention that the proceedings had to return appellant to the State of Washington were entirely proper. The interstate compact entered into by the states of Washington and Oregon, introduced in evidence in this cause as Respondent's Exhibit 12 (Tr. 79), expressly provides for the removal of parolees between the above states without the necessity of extradition proceedings. The constitutionality of these compacts has been considered and upheld in the following cases: *Pierce v. Smith, supra; In re Tenner,* 20 Cal. (2d) 670, 128 P. (2d) 338; *Gulley v. Apple,* 213 Ark. 350, 210 S. W. (2d) 514; *Ex parte Casemento,* 24 N. J. Misc. 345, 49 A. (2d) 437.

In any event, the validity of the proceedings had in the transfer of appellant from the State of Oregon to Washington is a matter which would only be considered *at the time of the transfer* by an appropriate proceeding *then* had. It is well settled that once a state obtains jurisdiction, such jurisdiction is not lost by the fact that it was obtained by illegal means. The following general rule is stated preceding an annotation at 18 A. L. R. 509:

> "Where a person accused of a crime is found within the territory of jurisdiction wherein he is so charged, the right to put him on trial for the offense charged is not impaired by the fact that he was brought from another jurisdiction by illegal means, such as kidnaping, unlawful force, fraud, or the like."

See also 22 Am. Jur., Extradition, § 65, where the above rule is again stated as being the holding of a majority of courts, including the federal courts. In the case of *Mahon v. Justice*, 127 U. S. 700, 32 L. ed. 283, 8 S. Ct. 1204, the reason for the rule is stated as follows:

> "They all proceed upon the obvious ground that the offender against the law of the state is not relieved from liability because of personal injuries received from private parties, or because of indignities committed against another state. It would indeed be a strange conclusion, if a party charged with a criminal offense could be excused from answering to the government whose laws he had violated, because other parties had done violence to him, and also committed an offense against the laws of another state."

Habeas corpus attacks the validity of the *present* confinement. Said confinement is pursuant to a valid judgment and sentence, and the manner of obtaining jurisdiction is not by this action reviewable.

(2) As to appellant's contention in his petition that his confinement in the *penitentiary* is improper inasmuch as the judgment and sentence ordered that he be confined in the *reformatory,* respondent is unable to perceive a federal question. For one who has been duly tried and convicted of the commission of a felony the manner of his custody as between a reformatory or penitentiary in the state is a matter peculiarly of state concern. Furthermore, although the judgment and sentence did order con-

inement in the state reformatory, section 5, chapter 114, Laws of Washington of 1935 (Rem. Rev. Stat. Supp. 10249-5), a statute in existence at the time the judgment and sentence in issue in this cause was rendered, provides:

> "Whenever in its judgment the best interests of the state or the welfare of any prisoner confined in any penal institution will be better served by his or her transfer to another institution the board of prison terms and paroles is authorized to order and effect such transfer."

It was pursuant to that authority that the order of transfer (Tr. 73) was entered, and that order was upheld by the Washington court in *Pierce v. Smith, supra,* at page 56.

(3) As to appellant's last contention in which he attacks the authority of the Board of Prison Terms and Paroles to reset the duration of his confinement (minimum sentence), the Washington Supreme Court in the *Pierce* case, *supra,* stated:

> "The contention of appellant that, when the board of prison terms and paroles has once fixed the duration of a prisoner's sentence, the period thus fixed becomes the maximum term, and the board is without authority to alter that term or to authorize the prisoner's detention beyond the expiration date of such period, is without substantial merit.
>
> "It is mandatory, under Laws of 1935, chapter 114, § 2, p. 309 (Rem. Rev. Stat. (Sup.), § 10249-2 [P.P.C. § 782-5]), upon the court to fix the maximum term of sentence only. Within six months after the admission of such convicted person to the penitentiary or reformatory, as the case may be, the board of prison terms and paroles 'shall fix the duration of his or her confiinement.' The statute further provides that the term of imprisonment so fixed shall not exceed the maximum provided by law for the offense for which the person was convicted, or the maximum fixed by the court, where the law does not provide for a maximum term. Any convicted per-

son undergoing sentence in the penitentiary or the reformatory, not sooner released under the provisions of § 2 of the cited statutes, shall, in accordance with the provisions of existing law,

> "'* * * be discharged from custody on serving the maximum punishment provided by law for the offense of which such person was convicted, or the maximum term fixed by the court where the law does not provide for a maximum term.'
>
> "The statute (Laws of 1939, chapter 142, § 4, p. 422, Rem. Rev. Stat. (Sup.), § 10249-4 [P.P.C. § 786-1]) relating to release on parole of prisoners who have been sentenced to a term in the state penitentiary or reformatory, provides that
>
> "'* * * no prisoner shall be released from the penitentiary or the reformatory unless, in the opinion of the Board of Prison, Terms and Paroles, his rehabilitation has been complete and he is a fit subject for release, or until his maximum term expires.'
>
> "Manifestly, a person is not entitled to release from the state penitentiary or reformatory prior to the expiration of his maximum term, unless the board of prison terms and paroles is of the view that he has been rehabilitated.
>
> "In *Lindsey v. Washington,* 301 U. S. 397, 81 L. Ed. 1182, 57 S. Ct. 797, the United States supreme court held that, under Laws of 1935, chapter 114, p. 308, the sentence of the defendant in this state for a period of fifteen years, was made mandatory by the statute; that the parole board was authorized to fix the duration of confinement within that period and to fix it anew within that period for infraction of the rules; and that, even if paroled, the prisoner would remain subject to surveillance, and, until the expiration of the fifteen years, his parole would be subject to revocation at the discretion of the board or the governor. The court stated:
>
> "'The effect of the new statute is to make mandatory what was before only the maximum sentence. Under it the prisoners may be held to confinement during the entire fifteen year

period. Even if they are admitted to parole, to which they become eligible after the expiration of the terms fixed by the board, they remain subject to its surveillance and the parole may, until the expiration of the fifteen years, be revoked at the discretion of the board or cancelled at the will of the governor. . . .

" 'Removal of the possibility of a sentence of less than fifteen years, at the end of which petitioners would be freed from further confinement and the tutelage of a parole revocable at will, operates to their detriment in the sense that the standard of punishment adopted by the new statute is more onerous than that of the old . . . It is plainly to the substantial disadvantage of petitioners to be deprived of all opportunity to receive a sentence which would give them freedom from custody and control prior to the expiration of the 15-year term.'

"In *In re Grieve v. Smith,* 26 Wn. (2d) 156, 173 P. (2d) 168, we held that the right to a discharge from confinement of a prisoner serving a maximum sentence, is not a matter of right but is a matter of discretion with the board of prison terms and paroles.

"However designated, the 'duration of confinement' fixed by the board of prison terms and paroles is, in effect, a minimum term (*State v. Fairbanks,* 25 Wn. (2d) 686, 171 P. (2d) 845), and that board had supervision over appellant and may cause him to be detained in the penitentiary until the expiration of his maximum sentence of twenty years."

Respondent finds it difficult to add anything to the above excerpt from the opinion of the Washington court. As there stated the procedure followed by the state of Washington in setting sentences and determining terms of imprisonment has been upheld by the Supreme Court of the United States. *Lindsey v. Washington,* 301 U. S. 397, 81 L. ed. 1182, 57 S. Ct. 797. In the state of Washington one who has been convicted is liable to imprisonment for the

full maximum term, and earlier release upon parole is a matter lying within the discretion of the Board of Prison Terms and Paroles. The setting of the duration of confinement is merely a guide set by that body to determine when an inmate may be considered for parole. It is no more than a minimum sentence. *Pierce v. Smith, supra.* Furthermore, the "duration of confinement" may be increased by the Board of Prison Terms and Paroles where rule infractions have been committed, § 2, chapter 114, Laws of 1935 (Rem. Rev. Stat. (Sup.) 10249-2).

As stated by the Washington supreme court in the *Pierce* case, *supra,* parole is a privilege, and there is no *right* to release at any time prior to the expiration of the maximum sentence.

It follows, then, that habeas corpus does not lie on this ground because (a) the procedure followed does not violate the Constitution or laws or treaties of the United States, and (b) because the maximum term has not yet been served no right to immediate release would occur even should error or irregularity be shown on this point.

CONCLUSION

Appellant was not entitled to issuance of the writ of habeas corpus from the lower court because he was not shown to be in custody in violation of the Constitution or laws or treaties of the United States. Since these same contentions have been considered and passed upon by the Washington Supreme Court, and the Supreme Court of the United States has denied *certiorari,* the lower court should have refused to consider the application. Concerning the merits of his contentions, it is too late to attack his transfer as a parole violator, but in any event it was regular, being in conformance with a compact entered into by the states of Washington and Oregon as approved by the Congress of the United States. The manner of appellant's custody, as between the reformatory and penitentiary, is solely of state concern. Inasmuch as appellant concedes the validity of the judgment and sentence adjudging him guilty of a felony and imposing a twenty year maximum term of confinement, and inasmuch as the maximum term has not yet expired and release prior to that time is not a right, appellant cannot here attack orders setting a duration of confinement less than the maximum term, and furthermore, such issue is not a question such as the Judicial Code allows consideration by federal courts in these matters.

Respectfully submitted,

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